91-988

No. 91-888

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DONNIE R. FINLEY, *et al.*,
Petitioners,

v.

HOECHST CELANESE CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

16 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE [1]

Petitioners are former employees of Respondent Hoechst Celanese Corporation ("Hoechst")[2] and Respondent's predecessor, Celanese Corporation ("Celanese"), who worked at a manufacturing facility in Greenville, South

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[1] Petitioners' statement of the case omits some basic facts which are material to the decisions rendered below and to this Court's consideration of whether certiorari should be granted. Therefore, in accordance with Supreme Court Rules 15.1 and 24.2, Respondent takes this opportunity to present the Court with a more accurate and informative statement of the case. Petitioners' rendition of the procedural history of this case is sufficient and will not be repeated.

[2] In accordance with Supreme Court Rule 29.1, Respondent declares that it is a wholly-owned subsidiary of Hoechst AG, a German corporation.

Carolina. Petitioners were separated from employment with Hoechst in connection with the closing of that facility. They now seek severance benefits in addition to those already received at the time of their separation. Their claims are based upon the Employee Retirement Income Security Act of 1974 ("ERISA" or "the Act"), 29 U.S.C. § 1001 *et seq.*

In December 1984, Celanese announced the closing of the Greenville Plant, to take place gradually over a three year period. At that time, company officials designed and announced a separation package for Greenville employees [3] which provided them with one week's pay for each year of service with the company, plus an additional week (known as "single separation pay" or a "one-for-one" package) as well as various other attractive benefits. Each Greenville employee who continued his employment until affected by the plant closing was eligible for the separation package, referred to throughout this litigation as the "Greenville Plan."

Celanese communicated the "Greenville Plan" to all Greenville employees at the time the closing was first announced. Details of the plan were further explained and confirmed over the next three years, at employee meetings and through written communications. The communications were always consistent. The Greenville employees were told that they would receive single separation pay. Every employee on the Greenville Plant payroll who was declared excess between December 1984 and the final closing of the plant received the single separation pay as promised.

In the Summer of 1986, in an entirely unrelated matter, Celanese and American Hoechst began to consider

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[3] In contrast to the designation "Employees," which refers only to the Petitioners in this lawsuit, the label "Greenville employees" is used to refer to *all* employees of Celanese's Greenville Plant, *including* Petitioners.

the possible advantages of a corporate merger. American Hoechst, Hoechst AG, and Celanese informally explored merger possibilities for several months before the talks progressed to the stage where an agreement could be drafted. On Wednesday, October 29, 1986, the parties agreed in principle that American Hoechst and Celanese should merge if details associated with such a merger could be agreed upon.

A Celanese Board of Directors meeting had been scheduled for Sunday, November 2, 1986. That quickly became the target date for completing a draft merger agreement to be submitted to the Board for approval. This meant that the entire merger agreement—of which schedule 7.7(h) (the provision for separation pay benefits) was but a small part—had to be drafted in a three to four day period. The drafters and negotiators worked around the clock from Wednesday, October 29, through Sunday, November 2, 1986.

Two related problems arose from this compressed timetable. First, the drafters knew from the beginning that the agreement would have to be drafted in very broad strokes. Given the looming deadline, the parties could not assess and discuss every one of a wide variety of issues, much less cover each one of them in depth. The drafters knew that some issues could be overlooked. They felt certain that some changes might be necessary after November 2, when they could obtain input from others.

Second, since Celanese was a public company, the proposed merger had to be kept secret to avoid any insider trading. This secrecy prevented the drafters from seeking valuable input from personnel outside the very limited circle of knowledgeable individuals. In other words, even aside from the time factor, the element of secrecy practically ensured that some issues would be omitted.

Since the parties were aware of these problems at the drafting stage, they expressly provided for future

changes. In Resolutions adopted by the Celanese Board of Directors on November 2, 1986, the directors authorized the execution of the merger agreement "with such changes or additions thereto as [the corporate] officers may approve." Celanese and American Hoechst knew that the merger agreement adopted by the Board of Directors on November 2 had to receive approval from the Federal Trade Commission (FTC) to become effective. The parties also knew and intended that the merger agreement could be changed at any time prior to the FTC's approval.

The merger agreement authorized by the Celanese Board included a section on separation benefits. Schedule 7.7(h) of the merger agreement provided that employees of the corporate survivor terminated within two years of the merger would be entitled to severance pay in the amount of two weeks' base pay for every year of service with Celanese or Hoechst, plus an additional two weeks' base pay (known as "double separation pay" or a "two-for-one" package)—that is, twice the amount specified in the Greenville Plan.[4]

American Hoechst and Celanese intended that only those employees terminated *as a result of the merger* would get the double separation pay. Although the

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[4] Schedule 7.7(h) of the merger agreement stated, in pertinent part:

> Notwithstanding the terms of the Company's . . . written separation pay policy, for each employee . . . whose employment is hereafter terminated . . . for any reason (other than for cause) at any time prior to January 1, 1989 . . . or who elects to terminate his employment prior to the expiration of the Termination Period by reason of a reduction in his base salary, Buyer will provide, or will cause the Company or Surviving Corporation to provide . . . separation pay, payable in a single sum within ten business days following such termination, equal to two weeks' base salary for each full or partial year of service with the Company and Surviving Corporation plus an additional two weeks' base salary.

Greenville employees were already covered under a separate, previously announced plan, the drafters of the merger agreement did not expressly exclude them from the agreement's double separation pay provision because they were not affected by the merger. When the Greenville question later surfaced, the contracting parties responded that the Greenville employees should be expressly excluded from the effects of schedule 7.7(h) since none of the Greenville employees were being terminated as a result of the merger.

Ron Silversten, Vice President and Associate General Counsel for Celanese, was the person most responsible for drafting schedule 7.7. Immediately after news of the merger was made public—on Monday, November 3, 1986—Silversten sent copies of the agreement's schedule 7.7 to all upper level human resource executives in Celanese. He explained that the schedule was drafted hurriedly and asked for comments and suggestions on any necessary changes.

Within a week, around November 10 or 11, several people asked Silversten if the merger agreement's benefits section was intended to cover the Greenville employees. Silversten told them that he assumed the answer was "no"; that schedule 7.7(h) did not apply to Greenville. His reasoning was that the goal of the merger agreement's drafters was to protect employees *who lost their job as a result of the merger*. However, in order to obtain a definitive answer, Silversten immediately consulted executives of the corporation's fibers operations who confirmed that schedule 7.7(h) was never intended to apply to Greenville employees. American Hoechst also agreed that schedule 7.7(h) should be changed. The final version of paragraph (h), which excluded the Greenville employees from the merger agreement's double separation pay, was adopted by the parties on February 20, 1987, through a formal amendment to the agreement of

merger.[5] The merger was finally approved and consummated on February 24, 1987.

The Greenville employees were notified of their exclusion immediately, in November 1986, when the question was first raised. Other consistent communications followed. In particular, the Celanese Interim Separation Pay Plan ("CISP Plan"), dated February 27, 1987, emphasized that the Greenville employees were excluded from the merger agreement's double separation pay provision. This plan, which applied to both salaried and hourly employees, was established to carry out the terms of the merger agreement between Celanese and American Hoechst as it applied to separation pay arrangements. Separation pay under the plan was to be computed according to the merger agreement's double separation pay provision. However, in keeping with the formal amendment to the merger agreement (accomplished one week earlier), the plan's eligibility provision excluded "employees affected by the previously announced shutdown of the company's Greenville Plant. . . ." Copies of the booklet were obtained by employees and passed by them around the Greenville Plant unofficially. The Employees have admitted that they saw the booklet and its Greenville exclusion.

Despite the long-term, consistent communications and implementation of the Greenville Plan, the Employees claim that they are entitled to the merger agreement's double separation pay benefits. Hoechst contends—and the district and circuit courts agreed—that the Employees received all the benefits to which they were legally entitled.

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[5] In its final form, schedule 7.7(h) provided double separation pay to employees separated "for any reason . . . other than the previously announced shutdown of the Company's Greenville, South Carolina plant . . . ."

SUMMARY OF THE ARGUMENT

The questions presented by Petitioners only concern the parties directly involved and are not of sufficient gravity or importance to the general public to warrant review by this Court. In particular, the first reason asserted for review expressly presents a matter of contractual interpretation which would require the Court to review and weigh the evidence and to discuss specific facts before ruling upon the correctness of the decisions below. Furthermore, the second reason is based upon an alleged conflict in the decisions of circuit courts which does not, in fact, exist. The alleged conflict is based upon Petitioners' misreading of the Fourth Circuit's opinion. In reality, both the district court and circuit court recognized the proposition that Petitioners claim was ignored, but each court nevertheless ruled against them. Petitioners' grounds for review amount to nothing more than a complaint that the courts below did not agree with Petitioners' interpretation of the contract.

ARGUMENT

I. PETITIONERS' ASSERTED REASONS FOR GRANTING CERTIORARI DO NOT FIT WITHIN THE WELL-ESTABLISHED CRITERIA ESSENTIAL FOR REVIEW.

The Employees have asserted two reasons for granting certiorari. Neither reason is compelling. The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was conferred upon the United States Supreme Court for two purposes: 1) to secure uniformity of decisions among certain courts; and 2) to bring up questions of importance which it is in the public interest to have decided by the court of last resort. *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 518, 530-31 (1957); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

Supreme Court Rule 10 embodies the purposes set forth above. Rule 10 emphasizes the discretionary nature of

review on writ of certiorari. It also indicates the types or "character" of reasons that will be considered by the Court for review. The rule itself expressly declares that the reasons enumerated therein are not all-inclusive. However, in order for a case to be reviewed, the reasons asserted must either fall within Rule 10 or otherwise present matters of exceptional gravity or importance to the general public. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916) (jurisdiction to review judgments of courts of appeals by certiorari is to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision); *In re Woods*, 143 U.S. 202 (1892). The reasons asserted for review in this case do not satisfy the above-stated criteria.

II. THE FIRST ASSERTED REASON PRESENTS A FACT-SPECIFIC QUESTION OF CONTRACTUAL INTERPRETATION WHICH IS ONLY IMPORTANT TO THE PARTIES DIRECTLY INVOLVED.

The first reason asserted for review does not expressly fit within one of the categories enumerated in Supreme Court Rule 10. Neither does it present an issue of significant gravity or importance to the general public. Rather, the first reason asserted for review by Petitioners presents a question of contractual interpretation which concerns only the parties directly involved in this dispute. Only the Employees and Hoechst have any significant stake in this controversy. The Employees claim that the circuit court's interpretation of the contract was incorrect, while Hoechst agrees with the court's interpretation. If this Court were to review that interpretation, the conclusion—whether an affirmance or a reversal—would still impact only the relatively few people who could assert claims under that particular contract. That is not a sufficient ground for review. Certiorari will not be granted to review a judgment of a court of appeals where the case, however important it may be to the petitioners, does not

involve a question of gravity or general importance, or present a conflict between decisions of certain courts. *Fields v. United States*, 205 U.S. 292 (1907); *see also Rudolph v. United States*, 370 U.S. 269, 270 (1962) (writ of certiorari was dismissed as improvidently granted where case involved merely a review of findings of fact which would be of no importance save to the litigants themselves), *reh'g denied*, 371 U.S. 854 (1962).

Furthermore, certiorari generally will be denied where the ground asserted for review would require the Court to review and weigh evidence and to discuss specific facts in order to rule upon the correctness of the decision below. *Texas v. Mead*, 465 U.S. 1041, 1043 (1984); *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also United States v. ITT Continental Baking Co.*, 420 U.S. 223, 226 n.2 (1975) (issue whether FTC consent order had been violated did not merit Supreme Court's grant of petition for certiorari to review court of appeals' judgment, where such issue concerned only a particular order as applied to a discrete set of facts). That is precisely what the Employees have asked the Court to do in this instance. The Employees have argued all along that the language found in section 9.3 of the merger agreement should be interpreted as a clear and specific expression by the parties of an intent to vest severance benefits, such that the parties could not later go back and amend the benefits provision. The district court declined to interpret section 9.3 in that manner, looking first at the contractual language by itself and then, alternatively, in light of extrinsic evidence. The Fourth Circuit affirmed the district court's decision, largely on the basis of its contractual interpretation.

The Employees have failed twice in their attempts to get a federal court to agree with their interpretation of the contract. Now, they are asking yet another court to view the facts, weigh the evidence, and interpret the contract in a manner consistent with their own interests.

Such a self-serving endeavor is obviously of no importance to the general public. In addition, since the question presented is one of interpretation of a very specific provision of a contract, it is not likely to be a question which will recur or present a conflict among circuit courts in the future.

III. THE FOURTH CIRCUIT'S JUDGMENT IS CONSISTENT WITH THE JUDGMENTS OF OTHER CIRCUIT COURTS AND, THUS, THERE IS NO CONFLICT AS ASSERTED IN THE SECOND REASON.

The second reason which the Employees assert as a ground for review is that there is a conflict between the Fourth Circuit's decision and prior decisions of other circuit courts of appeals. The Employees claim that the Fourth Circuit erred by failing to recognize that "under federal common law, an employer may vest severance benefits by clear, written expression of intent to do so, after which time the employer may not eliminate those benefit entitlements." Petition for Writ of Certiorari at 18 (December 16, 1991) (hereinafter referred to as "Petition"). The Employees' claim is incorrect. The Fourth Circuit *did* recognize that concept and, therefore, there is no conflict among the circuit courts.

In its briefs and arguments before the district court, Hoechst admitted that, in general, contracting parties may agree to provide in plan documents that severance benefits will vest. Hoechst pointed out, however, that before any contractual provision may supplant the well-established statutory scheme of vesting, there must be a specific expression of the employer's intent to be bound. Thus, Hoechst agreed with and cited the very proposition which the Employees claim was ignored.[6] Hoechst merely

[6] The Employees cite four cases in support of their argument that an employer may bind itself to vest severance benefits. All four cases support Hoechst's position, and all four were cited or dis-

argued that the proposition was not dispositive in this case.

The district court expressly recognized the concept at issue by stating that "[t]his court concurs with the rationale of these cases that federal common law should recognize contractual obligations relating to ERISA benefits that exceed the requirements of the ERISA statute." Dist. Ct. Order No. 2 at Petition B-19 (June 22, 1990) (discussing *Ryan v. Chromalloy American Corp.*, 877 F.2d 598 (7th Cir. 1989) and *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987)). However, after interpreting the language of the merger agreement, the district court held that the facts of this case did not demonstrate the existence of an agreement to vest. Dist. Ct. Order No. 2 at Petition B-24 to -25 (June 22, 1990). Therefore, ERISA's statutory scheme remained intact, and the severance benefits could be reduced or eliminated by amendment. *Id.*

Both parties also briefed and argued this issue before the Fourth Circuit Court of Appeals. Hoechst again referred to and discussed the above-stated proposition of federal common law, but argued that it did not entitle the Employees to extra benefits under the circumstances

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cussed by Hoechst in its briefs and arguments before the two lower courts. For example, *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987) and *Ryan v. Chromalloy American Corp.*, 877 F.2d 598 (7th Cir. 1989) both stand for the proposition that, in order to make severance benefits vest—and, thus, deviate from the statutory scheme—there must be a clear and specific expression of the employer's intent to be bound. Hoechst simply argued, and the courts agreed, that the evidence in this case did not demonstrate such an intent to vest. Further, Hoechst brought the case of *Howe v. Varity Corp.*, 896 F.2d 1107 (8th Cir. 1990), to the district court's attention in a special post-hearing brief. In a case construing contractual language similar to the case at bar, the *Howe* court showed very persuasively that the language of section 9.3 did not provide the clear and specific expression necessary to create a "vesting trigger" and take the severance benefits outside the normal statutory scheme of vesting.

of this case. The court of appeals interpreted the contractual language in light of ERISA and federal common law, agreed with Hoechst, and affirmed the district court's decision. The Fourth Circuit held that "the contracting parties were free to alter or eliminate any severance benefits which the Merger Agreement conferred on the appellants." Circuit Ct. Order at Petition A-19 (Aug. 21, 1991). The holding of the court was not that the parties lacked the power to make the benefits vest, but rather that they simply did not do so. The alleged conflict among the circuit courts on a question of law, therefore, does not exist.[7]

The issue again is essentially one involving the interpretation of a particular contract.[8] The Fourth Circuit Court of Appeals interpreted the contract in the same manner as the district court, that is, that it did not entitle the employees to double severance benefits. To put it another way, the language of the merger agreement did not automatically vest benefits in the Employees and preclude the contracting parties from later amending the plan. The conclusion is the same whether one looks at

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[7] The Employees' second asserted reason for granting certiorari is based on a misreading of the circuit court's opinion. The Fourth Circuit never *said* anywhere, either expressly or impliedly, that it refused to recognize the concept of federal common law which the Employees espouse (and Hoechst and the district court cited with approval). Even if this Court were to read the circuit court's decision in the same way as Petitioners, this would not be a case worth granting certiorari because it is not the "best vehicle" for addressing the alleged conflict. The Court should only grant certiorari in a case where the circuit court *expressly* refuses to recognize the concept, bases its judgment on that refusal, and thereby places itself in direct and unmistakable conflict with the decisions of other circuit courts.

[8] This is especially evident from the Employees' reasoning in their Petition that "[i]t is hard to imagine *language in a plan document* that could be any more clear of an intent to vest severance benefits than the language used in the Merger Agreement." Petition at 20-21 (emphasis added).

the circuit court's holding in terms of contract interpretation or federal common law. Under either view, the circuit court affirmed the district court's opinion that the contract in question gave the Employees no legal right to vested severance benefits. Thus, the Employees had received everything to which they were entitled.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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